UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISTOPHER MOEHRL, MICHAEL COLE, STEVE DARNELL, VALERIE NAGER, JACK RAMEY, SAWBILL STRATEGIC, INC., DANIEL UMPA, and JANE RUE, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE NATIONAL ASSOCIATION OF REALTORS, REALOGY HOLDINGS CORP., HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, THE LONG & FOSTER COMPANIES, INC., RE/MAX, LLC, and KELLER WILLIAMS REALTY, INC., Defendants.	Civil Action No. 1:19-cv-01610 Judge Andrea R. Wood Magistrate Judge M. David Weisman

STATEMENT OF INTEREST ON BEHALF OF
THE UNITED STATES OF AMERICA

MAKAN DELRAHIM
Assistant Attorney General

MICHAEL F. MURRAY
Deputy Assistant Attorney General

ANDREW J. ROBINSON
Counsel to the Assistant Attorney General

STEVEN J. MINTZ
Attorney

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Phone: (202) 353-0256
Fax: (202) 514-0536
Email: Steven.Mintz@usdoj.gov

JOHN R. LAUSCH, JR.
United States Attorney

THOMAS P. WALSH
Assistant U.S. Attorney

219 South Dearborn Street
Chicago, Illinois 60604
Phone: (312) 353-5312
thomas.walsh2@usdoj.gov

INTEREST OF THE UNITED STATES

The United States respectfully submits this statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court. The United States is principally responsible for enforcing the federal antitrust laws, *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *see* 15 U.S.C. §§ 4, 25, and has a strong interest in their correct application. We submit this statement to correct the inaccurate portrayal, by defendant The National Association of Realtors ("NAR"), of a 2008 consent decree between the United States and NAR.[1]

BACKGROUND

1. During the early 2000s, the United States investigated and resolved an antitrust case involving NAR rules that allegedly thwarted the utility and growth of Internet websites operated by real estate brokers. *United States v. NAR* Amended Complaint ¶¶ 1-4 (copy attached). The United States sought to protect entry, innovation, and competition by ensuring that multiple listing services ("MLS") would treat brokers who provide real estate brokerage services to sellers or buyers of residential real property through websites in the same way that they treat brokers who provide real estate brokerage services to sellers or buyers of residential real property through traditional "brick-and-mortar" business models. *Id.* ¶ 8.

[1] The United States takes no position, at this stage of the proceeding, on any other issue in the case.

Specifically, in 2003 NAR adopted a policy relating to "virtual office websites" ("VOW"s) that allowed brokers to opt out of having their listings displayed on the VOW sites of competing brokers and prohibited VOWs from engaging in certain conduct. The United States investigated that VOW policy and sued NAR in 2005. The United States and NAR settled the case and agreed to the 2008 consent decree. The decree prohibited NAR from adopting or enforcing any rule or practice that prohibited a broker from using a VOW or from impeding a broker's ability to operate a VOW. Doc. #67-1 (Johnson Decl. Ex. D) at 5-6. The decree required NAR to replace its VOW policy with a Modified VOW Policy approved by the government, and to take other antitrust compliance actions. *Id*. at 6-9.

2. Plaintiffs' Consolidated Amended Class Action Complaint ("CAC") (Doc. #84) alleges that defendants NAR and certain national real estate broker franchisors have conspired to require home sellers to (1) pay the brokers representing the buyers of their homes, and (2) pay brokers' commissions that are "inflated" by comparison to allegedly comparable markets in other countries. CAC ¶ 1. Specifically, plaintiffs allege that "NAR and its co-conspirators require *every* seller's broker … when listing a property on a Multiple Listing Service, to make a '*blanket unilateral offer[] of compensation*' to any broker who may find a buyer for the home. This requirement, and related terms implementing the requirement … is hereafter referred to as the Buyer Broker Commission Rule[.]" CAC ¶¶ 3,60 (emphases in original). They further allege that other NAR rules, "Case Interpretations," and "hidden fields" in MLSs exacerbate the anticompetitive effects

and prevent buyers from reducing their buyer broker's commission. *Id*. ¶¶ 4, 90 (quoting NAR Standard of Practice 3-2), 75-78 (describing "hidden fields" and "one-way information exchange" that "prevents price competition that benefits consumers while allowing brokers to put upward pressure on pricing and to punish brokers who deviate downwards"), 79 (quoting NAR's Code of Ethics Standard Practice 12-2), 88 (quoting NAR Standard of Practice 16-16), 89 (quoting NAR Case Interpretation #16-15). The NAR ethics rules and case interpretations, according to plaintiffs, "foreclose[] virtually all negotiation over the buyer-broker commission." *Id*. ¶ 89. This conduct allegedly violates (among other things) Section 1 of the Sherman Act, 15 U.S.C. § 1.[2]

3. NAR and the corporate defendants have moved to dismiss the CAC on several grounds. NAR's brief in support of its Motion to Dismiss (Doc. #114) refers twice to the 2008 consent decree. First, NAR asserts that the "MLS system" and "the rules upon which it has been based, have repeatedly been upheld by the courts. … It was explicitly permitted by the Department of Justice in a consent decree that expressly authorizes NAR to limit membership in an MLS to persons who make offers of cooperation and compensation to other members of the MLS—a decree that

[2] Plaintiffs also allege that the United States has opened an antitrust investigation of practices in the market for residential real estate brokerage services. CAC ¶¶ 1, 72. Although the United States generally does not comment on the existence or non-existence of pending investigations, it acknowledges that a Civil Investigative Demand relating to an investigation of residential real estate brokerage was published in a trade publication. The focus and scope of that investigation, however, have not been publicly disclosed.

was approved by Judge Kennelly of this Court." Doc. #114 at 1-2 (case citations omitted). Second, NAR asserts in a separate paragraph that

> Other attacks on the rules governing MLSs have been rejected because courts have recognized the efficiency and consumer benefits provided by MLSs. … The Department of Justice, similarly, entered into a consent decree, approved by a Court in this District, expressly permitting NAR to maintain a rule that provides that MLS membership may be made contingent on a broker's agreement to "actively endeavor" to "make or accept offers of cooperation and compensation" through the MLS. Plaintiffs have totally ignored the long antitrust scrutiny of MLSs and the repeated judicial conclusion that MLSs and the rules that govern them are procompetitive.

Doc. #114 at 21-22 (case citations omitted).

ARGUMENT

NAR inaccurately portrays the 2008 consent decree. The consent decree resolved the United States' antitrust claims against NAR for its exclusionary policies targeting brokers using innovative platforms. In that case the United States did not examine the rest of NAR's policies, including those at issue here, and therefore those policies simply were not subjected to antitrust scrutiny. Importantly, those other policies were in no sense analyzed and found consistent with antitrust laws.

NAR attempts to give the decree much broader significance, but it does so through an imprecise reading of the decree. NAR's first reference to the decree, by using the ambiguous noun "It," suggests that the United States affirmatively approved an entire "MLS system" and all of its related rules. NAR's second reference sandwiches its reference to the consent decree between two sentences asserting that *court decisions* have found MLSs to be procompetitive. Then, by

using the word "similarly," NAR gives the impression that the *United States* determined that a NAR rule concerning MLS membership was procompetitive, or even that the specific rules challenged by the plaintiffs here are procompetitive. Those impressions are incorrect.

The United States' 2005 lawsuit and resulting 2008 consent decree (*see* Doc. #67-1, Johnson Decl. Ex. D), which expired in November 2018, had nothing to do with the specific NAR rules and "Case Interpretations" challenged by the plaintiffs here. Rather, they focused narrowly on NAR rules that allegedly thwarted the effectiveness, during the early 2000s, of Internet websites operated by real estate brokers. *United States v. NAR* Amended Complaint ¶¶ 1-4. Indeed, the United States' Amended Complaint (amended to account for NAR's modification to its VOW policy) states that the purpose of the action was to "enjoin the defendant—a national association of real estate brokers—from maintaining or enforcing policies that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers, and from adopting other related anticompetitive rules." *Id*. ¶ 1. Every paragraph setting forth the "Nature of the Offense" focuses on NAR's initial and modified VOW policies. *Id*. ¶¶ 30-43. The specific "Violation Alleged" is that "NAR's adoption of the above-referenced provisions in its Initial VOW policy and its Modified VOW Policy, or equivalent provisions, constitutes a contract, combination, or conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service

markets throughout the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1." *Id*. ¶ 44.

The United States did not affirmatively find any NAR rule or policy to be "procompetitive" in the 2008 consent decree. Nor does the prior consent decree in any way "authorize" the system that plaintiffs' CAC challenges. The consent decree does not mention the NAR Standards of Practice 3-2, 12-2, or 16-16, NAR Case Interpretation #16-15, or the "hidden fields" in MLSs, which are the other NAR provisions and practices challenged by the plaintiffs.[3]

NAR's claim to the contrary relies on a section of the decree titled "Permitted Conduct." Doc. #67-1 (Johnson Decl. Ex. D) at 9. That section identified NAR conduct that was not at issue in the case and which the consent decree was not intended to affect. That the consent decree identified certain conduct as not affected by its prohibitions does not mean that the conduct is permitted if it can be

[3] Even an article by NAR's own Declarant, Katie Johnson, confirms that the consent decree focused on NAR's rules governing VOWs, not the rules challenged in this case. *See* Katie Johnson, "Breaking Down the 2008 DOJ-NAR Settlement Agreement," REALTOR Magazine (Feb. 14, 2018) (copy attached). The article explains that the scope of the decree "is narrowly focused on a broker's operation of a virtual office website and the use of MLS listing data on such a site[.]" *Id*. at 1. The article asserts that the "crux" of the consent decree is the prohibition on "all REALTOR associations and association-owned MLSs from impeding a broker's ability to operate a VOW." *Id*. at 3. "Every other provision prohibiting or requiring certain conduct of NAR is geared toward achieving this objective that we refer to as 'the parity rule.' That is, MLSs must treat brokers providing real estate services via websites the same way they treat brokers providing real estate services via bricks-and-mortar businesses." *Id*. The article does not mention the specific section of the NAR Handbook challenged by the plaintiffs, or anything in NAR's Code of Ethics or Case Interpretations, as having been at issue in the consent decree in any way.

shown to violate the antitrust laws. For example, in *Penne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143, 1150 (8th Cir. 1979), the defendant realty board argued that its dissemination of commission rate information was permitted by an earlier settlement and injunction stating that "[n]othing in this injunction shall be deemed to prohibit" that conduct. The Court of Appeals rejected that argument, stating "[t]he short answer to this argument is that nothing in the Forbes injunction … can be construed to countenance the sort of dissemination of price information as is here involved if such dissemination is shown to have anticompetitive effects forbidden under the Sherman Act."[4] *Id*.

The language of the decree also makes clear that the United States did not affirmatively endorse any NAR rule or policy regarding "cooperation and compensation." The consent decree merely permitted NAR to limit MLS participation to active individuals or firms, by stating that it did not prohibit NAR from "adopting and maintaining the definition of MLS Participant and the accompanying Note, together attached as Exhibit B." Doc. #67-1 (Johnson Decl. Ex. D) at 9. The "definition of MLS Participant" and the Note in Exhibit B provide, in turn, that "[m]ere possession of a broker's license is not sufficient to qualify for MLS participation" and that "the requirement that an individual or firm 'offers or accepts

[4] Similarly, because 15 U.S.C. § 15(a) creates a private cause of action for violation of the antitrust laws, even if the allegedly anticompetitive conduct in this case was the same as in the 2008 consent decree (which it is not), the United States' settlement of its own claims before trial would not foreclose claims by private parties. *See also* 15 U.S.C. § 16(a) (consent decrees in government cases made before any testimony is taken are not prima facie evidence in private cases).

cooperation and compensation' means that the Participant actively endeavors during the operation of its real estate business to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS." These definitional requirements recognized that the Final Judgment's prohibition of NAR's restrictions on VOWs did not override the way brokerage activity in general was conducted when the case settled.

Consistent with *Penne*, the 2008 consent decree contained an express reservation of the United States' rights in Section IX, "No Limitation on Government Rights." Doc. #67-1 (Johnson Decl. Ex. D) at 11. That section provides that "[n]othing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards." The paragraph of the decree that NAR appears to rely on as "approving" an MLS system, *see id*. § VI(A) at 9, is expressly conditioned on this reservation of the United States' rights. This reservation therefore further undercuts any notion that the United States somehow granted immunity to an "MLS system" or all NAR rules relating to an MLS. This reservation also confirms that the United States did not permit NAR to use the consent decree to shield from investigation or challenge any conduct or rules shown to be anticompetitive.

CONCLUSION

The United States did not, in the 2008 consent decree, approve any NAR rule or policy as procompetitive. The specific NAR rules challenged by the plaintiffs were neither scrutinized nor litigated in the United States' case.

Dated: October 7, 2019

Respectfully submitted.

/s/ Steven J. Mintz

MAKAN DELRAHIM
Assistant Attorney General

MICHAEL F. MURRAY
Deputy Assistant Attorney General

ANDREW J. ROBINSON
Counsel to the Assistant Attorney General

STEVEN J. MINTZ
Attorney

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Phone: (202) 353-0256
Fax: (202) 514-0536
Email: Steven.Mintz@usdoj.gov

JOHN R. LAUSCH, JR.
United States Attorney

THOMAS P. WALSH
Assistant U.S. Attorney
219 South Dearborn Street
Chicago, Illinois 60604
Phone: (312) 353-5312
thomas.walsh2@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2019, I electronically filed the foregoing Statement of Interest on Behalf of the United States of America with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record.

Respectfully submitted.

/s/ Steven J. Mintz

Attorney for the United States

.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
Department of Justice, Antitrust Division,
325 7th Street, N.W., Suite 300
Washington, DC 20530,

Plaintiff,

v.

NATIONAL ASSOCIATION OF REALTORS
430 North Michigan Ave.
Chicago, IL 60611,

Defendant.

Civil Action No. 05C-5140

Judge Filip

Magistrate Judge Denlow

AMENDED COMPLAINT

The United States of America, by its attorneys acting under the direction of the Attorney General, brings this civil action pursuant to Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, to obtain equitable and other relief to prevent and restrain violations of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1. The United States alleges:

1. The United States brings this action to enjoin the defendant – a national association of real estate brokers – from maintaining or enforcing policies that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers, and from adopting other related anticompetitive rules.

2. The brokers against whom the policies discriminate operate secure, password-protected Internet sites that enable the brokers' customers to search for and receive real estate

listings over the Internet. These websites thus replace or augment the traditional practice by which the broker conducts a search of properties for sale and then provides information to the customer by hand, mail, fax, or e-mail. Since these websites were first developed in the late 1990s, brokers' use of the Internet in connection with their delivery of brokerage services has become an important competitive alternative to traditional "brick-and-mortar" business models.

3. Defendant's members include traditional brokers who are concerned about competition from Internet-savvy brokers. Before defendant adopted its policies, several of its members voiced opposition to brokers' delivery of listings to customers through their websites – sites that defendant referred to as "virtual office websites," or "VOWs." The head of the working group created by defendant to develop regulations for VOWs argued that defendant should act quickly in adopting regulations for the use of these websites because brokers operating VOWs were "scooping up market share just below the radar." The chairman of the board of RE/MAX, the nation's second-largest real estate franchisor, publicly expressed his concern that these Internet sites would inevitably place downward pressure on brokers' commission rates. One broker complained that because of the lower cost structure of brokers who provide listings to their customers over the Internet, "they are able to kick-back 1% of the sales price to the buyer." And Cendant, the nation's largest real estate franchisor and owner of the nation's largest real estate brokerage, asserted in a widely circulated white paper that it was "not feasible" for even the largest traditional brokers to compete with large Internet companies that operated or affiliated with brokers operating VOWs.

4. In response to such concerns, defendant, through its members, adopted a policy (the "Initial VOW Policy") limiting this new competition. The Initial VOW Policy has been

implemented in many markets. After plaintiff informed NAR of its intention to bring this action, NAR announced that it had modified this policy (the "Modified VOW Policy"). Plaintiff challenges both policies in this action as part of a single, ongoing contract, combination, or conspiracy.

5. These policies significantly alter the rules governing multiple listing services ("MLSs"). MLSs collect detailed information about nearly all properties for sale through brokers and are indispensable tools for brokers serving buyers and sellers in each MLS's market area. Defendant's local Realtor associations ("member boards") control a majority of the MLSs in the United States.

6. Defendant's VOW Policies permit brokers to withhold their clients' listings from VOW operators by means of an "opt-out" right. In essence, the policies allow traditional brokers to block the customers of web-based competitors from using the Internet to review the same set of MLS listings that the traditional brokers provide to their customers.

7. The working group that formulated defendant's Initial VOW Policy understood that the opt-out right was fundamentally anticompetitive and harmful to consumers. Two members of the working group wrote that the opt-out right would be "abused beyond belief" as traditional brokers selectively withhold listings from particular VOW-based competitors. The chairman of the working group admitted that the opt-out right was likely to be exercised by brokers notwithstanding the fact that "it may not be in the seller[']s best interest to opt out." But he took comfort in the fact that the rule did not require brokers to disclose to clients that their listings would be withheld from some prospective purchasers as a result of the brokers' opt-out decision, thus providing brokers "flexibility without conversation."

8. Defendant's VOW Policies restrict the manner in which brokers with efficient, Internet-based business models may provide listings to their customers, and impose additional restrictions on brokers operating VOWs that do not apply to their traditional competitors. Defendant thus denies brokers using new technologies and business models the same benefits of MLS membership available to their competitor brokers, and it suppresses technological innovation, discourages competition on price and quality, and raises barriers to entry. Defendant – an association of competitors – has agreed to policies that suppress new competition and harm consumers.

JURISDICTION AND VENUE

9. This Complaint is filed under Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, to prevent and restrain violations by defendant of Section 1 of the Sherman Act, 15 U.S.C. § 1. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1337(a), and 1345.

10. Venue is proper in this district under 28 U.S.C. § 1391(b) because defendant maintains its principal place of business in Chicago, Illinois, and is found here.

DEFENDANT

11. Defendant National Association of Realtors ("NAR") is a trade association organized under the laws of Illinois with its principal place of business in Chicago, Illinois. NAR establishes and enforces policies and professional standards for its over one million individual member brokers and their affiliated agents and sales associates ("Realtors"), and 1,600 local and state member boards. NAR's member brokers compete with one another in local brokerage services markets to represent consumers in connection with real estate transactions.

CONCERTED ACTION

12. Various others, not named as defendants, have contracted, combined, or conspired with NAR in the violations alleged in this Complaint and have performed acts and made statements in furtherance thereof.

TRADE AND COMMERCE

13. NAR's policies govern the conduct of its members in all fifty states, including all Realtors and all of NAR's member boards. NAR's member boards control approximately eighty percent of the approximately 1,000 MLSs in the United States.

14. NAR's activities, and the violations alleged in this Complaint, affect home buyers and sellers located throughout the United States.

15. NAR, through its members, is engaged in interstate commerce and is engaged in activity affecting interstate commerce.

RELEVANT MARKETS

16. The provision of real estate brokerage services to sellers of residential real property and the provision of real estate brokerage services to buyers of residential real property are relevant service markets.

17. The real estate brokerage business is local in nature. Most sellers prefer to work with a broker who is familiar with local market conditions and who maintains an office or affiliated sales associates within a reasonable distance of the seller's property. Likewise, most buyers seek to purchase property in a particular city, community, or neighborhood, and typically prefer to work with a broker who has knowledge of the area in which they have an interest. The geographic coverage of the MLS serving each town, city, or metropolitan area normally

establishes the outermost boundaries of each relevant geographic market, although meaningful competition among brokers may occur in narrower local areas.

BACKGROUND OF THE OFFENSE

18. At any one time there are over 1.5 million homes for sale in the United States. Most home sellers and buyers engage residential real estate brokers to facilitate transactions.

19. The predominant form of payment for brokerage services is a "commission," a percentage of the price paid for the property. In a typical transaction, the seller agrees to pay a commission to the broker who has contracted with the seller to market the home (the "listing broker"). If the listing broker finds the buyer, the listing broker keeps the full commission. Frequently, however, a second broker (the "cooperating broker") finds the buyer, and the two brokers share the commission.

20. After a listing broker has established an agency relationship with a seller, the broker typically submits detailed information regarding the seller's property to a local NAR-affiliated MLS. Along with the information about the property it submits to the MLS, the listing broker also typically includes an offer to split the commission with any cooperating broker.

Multiple Listing Services

21. MLSs are joint ventures among competing brokers to share their clients' listings and to cooperate in other ways. MLSs list virtually all homes for sale through a broker in the areas they serve. In a substantial majority of markets, a single MLS provides the only available comprehensive compilation of listings. The MLS allows brokers representing sellers to effectively market the sellers' properties to all other broker participants in the MLS and their

buyer customers. Conversely, the MLS allows brokers to provide their buyer customers information about all listed properties in which the customers might have an interest.

22. NAR promulgates rules governing the conduct of MLSs and requires its member boards to adopt these rules.

23. The vast majority of brokers believe that they must participate in the MLS operating in their local market in order to adequately serve their customers and compete with other brokers. As a result, few brokers would withdraw from MLS participation even if the fees or other costs associated with that participation substantially increased.

24. By virtue of industry-wide participation and control over a critically important input, the MLS (a joint venture of competing brokers) has market power in almost every relevant market.

25. The methods of making MLS information available to customers have changed as technology has evolved. From the 1920s, when MLSs first became prevalent, brokers allowed customers to view a printed "MLS book." Later, the availability of copy machines allowed brokers to reproduce pages from the MLS book and deliver the pages with responsive listings to customers by hand or mail. The advent of facsimile transmission – and, later, electronic mail – further quickened the process of delivering MLS listings to customers.

Virtual Office Websites

26. With the development of the Internet as an information source for consumers, potential home buyers began to seek Internet sources of information about homes for sale. Beginning in the late 1990s, a number of NAR member brokers began creating password-protected websites that enabled potential home buyers, once they had registered as customers of

the broker and agreed to certain restrictions on their use of the data, to search the MLS database themselves and to obtain responsive MLS listings over the Internet. These websites came to be known as virtual office websites or VOWs. NAR recognizes the Internet delivery of MLS listings to customers to be an authorized method of providing brokerage services.

27. Brokers can use the Internet to operate more efficiently than they can by using only traditional methods. By transferring search functions from the broker to customers who prefer such control over the process, VOW-operating brokers allow customers to educate themselves at their own pace about the market in which they are considering a purchase. By doing so, brokers with successful password-protected websites are able to reduce or eliminate the time and expense involved in identifying and providing relevant listings and otherwise educating their customers. These brokers also spend less time on home tours with their buyer customers, as these buyers frequently tour fewer homes before making a purchase decision than typical buyers. With lower cost structures, brokers with Internet-intensive business models have offered discounted commissions to sellers or commission rebates to buyers.

28. Other sources of listing information on the Internet are inferior to the password-protected VOWs because they do not and cannot guarantee access to all information available in the MLS.

29. Brokers can also use the Internet to support a "referral" business model. Referral services provide brokers information about potential buyers in return for a share of any commission the broker receives if the "lead" results in a completed transaction. Brokers are not obliged to purchase leads from referral services and do so only when they choose to. Some traditional brokers refer customers to other brokers for a fee, and some VOW operators,

similarly, have referred (or have considered referring) some of their customers to other brokers for a fee. Many brokers dislike the concept of paying for leads, and the prospect that Internet-savvy brokers could support referral business models has been a source of industry antipathy to VOWs.

NATURE OF THE OFFENSE

30. Brokers with innovative, Internet-based business models present a competitive challenge to brokers who provide listings to their customers only by traditional methods. Many brick-and-mortar brokers fear the ability of VOW operators to use Internet technology to attract more customers and provide better service at a lower cost.

31. In response to concerns raised by certain NAR members about this new form of competition, NAR's Board of Directors voted on May 17, 2003, to adopt the "Initial VOW Policy," a "Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants ('Virtual Office Websites')." Prior to the filing of the Complaint in this action, NAR had mandated that all 1,600 of its member boards implement the Initial VOW Policy by January 1, 2006. Approximately 200 member boards implemented the Initial VOW Policy and received NAR's approval of their implementing rules.

32. Section I.3 of the Initial VOW Policy contains an opt-out provision that forbids any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker. Specifically, the opt-out provision allows brokers to direct that their clients' listings not be displayed on any VOW (a "blanket opt-out"), or on a particular competing broker's VOW (a "selective opt-out").

33. In contrast, prior to NAR's adoption of the Initial VOW Policy, a broker could provide any relevant listing in the MLS database to any customer – by whatever method the customer or broker preferred, including via the Internet. Nearly all of NAR's member boards had also adopted rules requiring all participants in their affiliated MLSs to submit, with minor exceptions, all of their clients' listings to the MLS. More importantly, NAR did not permit any broker to withhold his or her clients' listings from a rival.

34. In several of the markets in which NAR's member boards have implemented the Initial VOW Policy, brokers have already exercised their opt-out rights to withhold their clients' listings from the customers of brokers operating VOWs, as well as from brokers who will use password-protected websites to provide listings to their customers in the future. In at least one such instance, an innovative broker discontinued operation of his website because all of his competitor brokers had opted out, making him unable to effectively serve his customers through operation of his site.

35. Section II.4.g of the Initial VOW Policy contains an "anti-referral" provision that, with minor exceptions, forbids VOW operators from referring their customers to "any other entity" for a fee. In contrast, no NAR rule limits referrals for a fee by brokers who do not convey MLS listings to customers over the Internet.

36. The Initial VOW Policy includes other provisions that impose greater restrictions and limitations on brokers with Internet-based business models than on traditional brokers. For example, under section IV.1.b of the Initial VOW Policy, NAR's member boards may forbid VOW operators from displaying advertising on any website on which MLS listings information

is displayed. In contrast, no NAR rule limits the ability of traditional brokers to include advertisements in packages of printed listings they provide to their customers.

37. The Initial VOW Policy also contains provisions to make it obligatory and enforceable. Section I.4 of the Initial VOW Policy expressly forbids NAR's member boards from adopting rules "more or less restrictive than, or otherwise inconsistent with" the Initial VOW Policy, including the opt-out provisions and the anti-referral provision. Appendix A to the Initial VOW Policy provides for remedies and sanctions for violation of the Policy, including financial penalties and termination of MLS privileges.

38. On September 8, 2005, after plaintiff informed NAR of its intention to bring this action, NAR advised its member boards to suspend application and enforcement of the above-referenced provisions of the Initial VOW Policy, and announced its adoption of a new "Internet Listings Display Policy" and its revision of an MLS membership policy (together, the "Modified VOW Policy"). NAR's Modified VOW Policy continues to impede brokers from using the Internet to serve home sellers and buyers more efficiently and cost effectively. NAR's Modified VOW Policy mandates that all of NAR's member boards enact rules implementing the Internet Listings Display Policy by July 1, 2006, but NAR subsequently communicated to its member boards that they "wait to adopt" the policy "until th[is] litigation is over."

39. Section I.3 of the Modified VOW Policy contains a blanket opt-out provision that forbids any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker. Specifically, the opt-out provision allows brokers to direct that their clients' listings not be displayed on any competitor's Internet site. When exercised, this provision prevents a broker from providing over the Internet the same

MLS information that brick-and-mortar brokers can provide in their offices. Additionally, NAR's Modified VOW Policy specifically exempts its own "Official Site," Realtor.com, from the blanket opt out that applies to all Internet sites operated by brokers.

40. The portion of the Modified VOW Policy that is NAR's revision to its membership policies – much like the Initial VOW Policy's anti-referral rule – denies MLS membership and access to listings to brokers operating referral services. This membership policy effectively forbids Internet-based brokers from referring their customers to other brokers for a fee.

41. NAR's Modified VOW Policy includes other provisions that restrict brokers' ability to use the Internet to serve their customers effectively. The Modified VOW Policy, for example, allows MLSs to downgrade the quality of the data feed they provide brokers, effectively restraining brokers from providing innovative, Internet-based features to enhance the service they offer their customers. The Modified VOW Policy also permits MLSs to interfere with efficient "cobranding" relationships between brokers and entities that refer potential customers to the broker.

42. Defendant's policies, both the Initial VOW Policy and the Modified VOW Policy, thus prevent brokers from guaranteeing customers access through the Internet to all relevant listing information, increase the business risk and other costs associated with operating an efficient, Internet-intensive brokerage, deny brokers a source of high-quality referrals, and withhold from Internet brokers revenue streams permitted to other participants in the MLS. Moreover, the opt-out provisions provide brokers an effective tool to individually or collectively punish aggressive competition by any Internet-based broker.

43. Unless permanently restrained and enjoined, defendant will continue to engage in conduct that restricts competition from innovative brokers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

VIOLATION ALLEGED

44. NAR's adoption of the above-referenced provisions in its Initial VOW Policy and its Modified VOW Policy, or equivalent provisions, constitutes a contract, combination, or conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

45. The aforesaid contract, combination, or conspiracy has had and will continue to have anticompetitive effects in the relevant markets, including:

a. suppressing technological innovation;

b. reducing competition on price and quality;

c. restricting efficient cooperation among brokers;

d. making express or tacit collusion more likely; and

e. raising barriers to entry.

46. This contract, combination, or conspiracy is not reasonably necessary to accomplish any procompetitive objective, or, alternatively, its scope is broader than necessary to accomplish any such objective.

REQUEST FOR RELIEF

WHEREFORE, the United States prays that final judgment be entered against defendant declaring, ordering, and adjudging:

a. that the aforesaid contract, combination, or conspiracy unreasonably restrains trade and is illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1;

b. that the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules implementing the opt-out provisions;

c. that the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules implementing the anti-referral provision or an MLS membership restriction that denies MLS access to operators of Internet-based referral services;

d. that the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules that restrict – or condition MLS access or MLS participation rights on – the method by which a broker interacts with his or her customers, competitor brokers, or other persons or entities;

e. that the Court grant such other relief as the United States may request and the Court deems just and proper; and

f. that the United States recover its costs in this action.

Dated: October 4, 2005

J. BRUCE McDONALD
Deputy Assistant Attorney General

J. ROBERT KRAMER II
Director of Operations

PATRICK J. FITZGERALD
United States Attorney
Northern District of Illinois
by Linda Wawzenski
Assistant United States Attorney

CRAIG W. CONRATH
DAVID C. KULLY
MARY BETH McGEE
ALLEN P. GRUNES
LISA A. SCANLON

Attorneys for the United States
Department of Justice
Antitrust Division
325 Seventh Street, N.W., Suite 300
Washington, DC 20530
Telephone: (202) 305-9969
Facsimile: (202) 307-9952

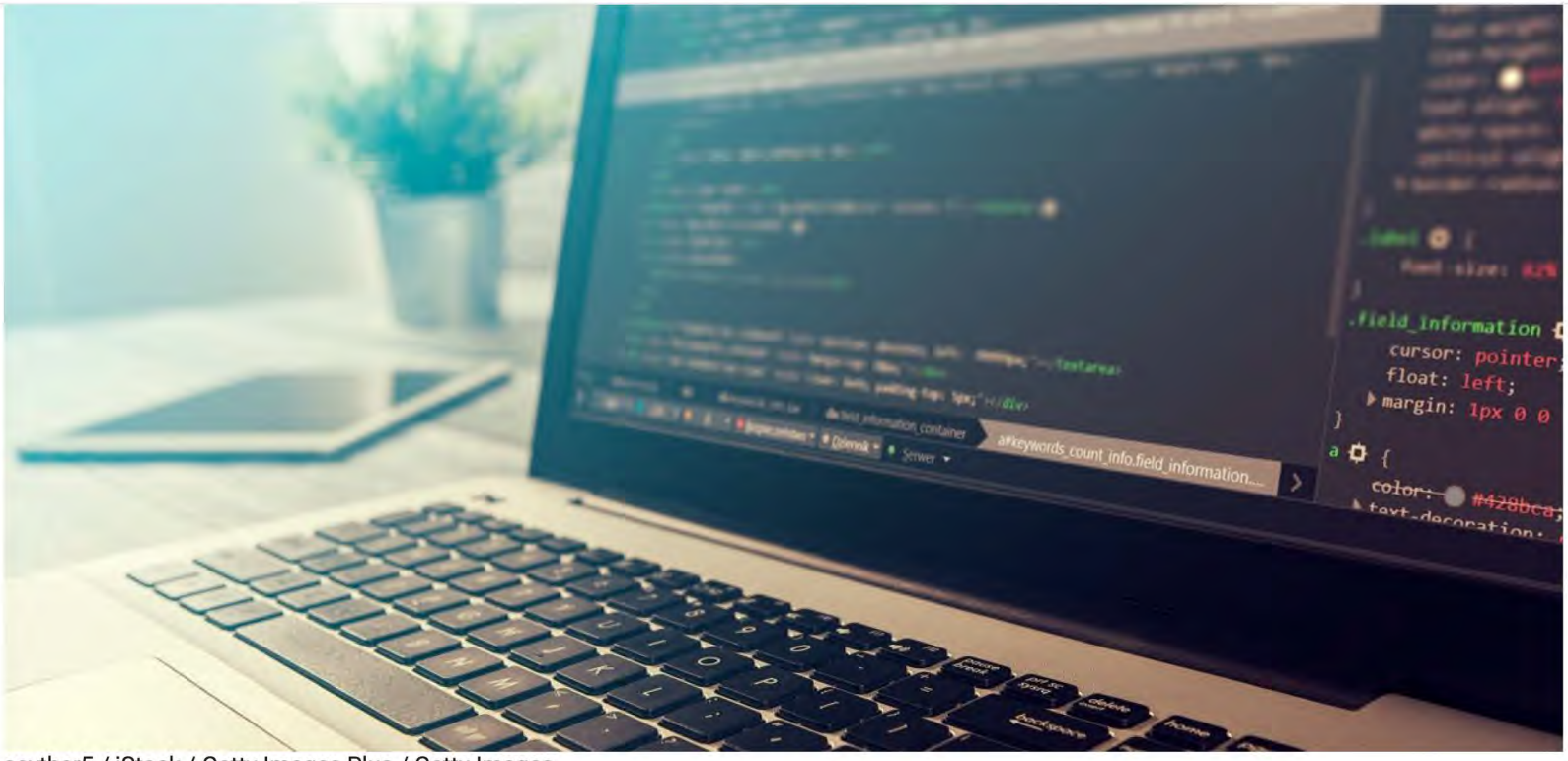
CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2005, I have caused a copy of the foregoing Amended Complaint be served by Federal Express on counsel for Defendant in this matter:

Jack R. Bierig
Sidley Austin Brown & Wood, LLP
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603

Linda Wawzenski

NATIONAL ASSOCIATION of REALTORS®



scyther5 / iStock / Getty Images Plus / Getty Images

Breaking Down the 2008 DOJ–NAR Settlement Agreement

Know what a VOW is — and what NAR and MLSs have done to facilitate competition — when talking about NAR's soon-to-expire 10-year agreement with the Department of Justice.

February 14, 2018
Being a Broker, MLS & Online Listings
By: Katie Johnson

There has been a lot of speculation recently about the 2008 settlement agreement between the Department of Justice and the National Association of REALTOR® and what will happen when that agreement expires in November 2018. Much of this speculation misconstrues the settlement agreement, the practices it addresses, and what it accomplished. Here, I aim to break it down so that any future discussion about the fate of the settlement agreement, or the conduct of NAR and MLSs following expiration of the agreement, can be based on a correct understanding of that agreement.

The 2008 DOJ-NAR settlement agreement pertains specifically to NAR's MLS policy for brokers that operate virtual office websites, also called VOWs.

The scope of the 2008 settlement agreement is narrowly focused on a broker's operation of a virtual office website and the use of MLS listing data on such a site: Broker + VOW. Two critical components to any discussion invoking the 2008 settlement agreement.

A VOW is:

- a website operated by a broker;
- through which the broker is capable of providing real estate brokerage services;
- to consumers with whom the broker has first established a broker-consumer relationship, as defined by state law;
- where the consumer has the ability to search MLS data, subject to the broker's oversight, supervision, and accountability.

In 2003, NAR adopted a VOW policy that, among other things:

- Allowed brokers to opt out of having their listings displayed on the VOW sites of other brokers
- Prohibited VOWs from referring consumers to other real estate professionals for a fee
- Prohibited VOWs from displaying an advertisement for one broker on a page displaying the listing of another broker

The Department of Justice believed those three aspects of the VOW policy to be anticompetitive and initiated a two-year investigation that resulted in DOJ filing a lawsuit against NAR in 2005. The 2008 settlement agreement required NAR to replace the existing VOW policy with the Modified VOW Policy approved by the DOJ, and to take other actions described below. Significantly, the settlement agreement does not address or limit distribution of MLS or other property listing data to real estate portals, such as realtor.com or Zillow, or other third-party sites. It covers only the use of MLS listing data on VOW sites.

> ### In the News
>
> For another perspective on NAR's VOW policy and the impending expiration of our agreement with the Department of Justice, read this Feb. 11, 2018, article from the trade newspaper *Banker & Tradesman*.

The Modified VOW policy contains very detailed criteria and requirements for the relationship between the broker operating the VOW site and the consumer receiving the brokerage services on that site. The vast majority of internet sites that make property listing information available to consumers do not comply with those criteria and requirements, and therefore are not websites to which the Modified VOW policy and the 2008 settlement apply.

While we do not know how many VOWs are still operating today, we do know that NAR's MLS policies have evolved over the past decade to permit MLS participants to share a wealth of MLS data with consumers on their public websites, including information that was once only available via VOWs. For example, in 2014, NAR's MLS rules were amended to authorize use of any MLS content for valuation purposes when servicing clients and customers, including online displays of property valuations known as AVMs. In 2015, NAR's MLS rules were amended to require that non-confidential pending sale listing data be included in IDX data feeds and to eliminate any restrictions on participants' display of pending listings. Also in 2015, the NAR MLS Committee approved a policy requiring MLSs to provide at least three years of sold data for display on participants' IDX sites, and that policy was expanded last year to require MLSs to provide all sold data available as of 2012.

Moreover, it's often overlooked that well before adoption of the VOW rules challenged by the DOJ, NAR adopted policies that facilitated the display of property listing data by brokers on public internet sites. That was achieved when NAR established the IDX policy in May 2001. DOJ has never voiced any concerns about the IDX policy, and undoubtedly recognizes the pro-competitive benefits that policy provides.

The 2008 DOJ-NAR settlement agreement prohibits all REALTOR® associations and association-owned MLSs from impeding a broker's ability to operate a VOW.

> *"NAR shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery."*

This is the crux of the 2008 settlement agreement. Every other provision prohibiting or requiring certain conduct of NAR is geared toward achieving this objective that we refer to as "the parity rule." That is, MLSs must treat brokers providing real estate services via websites the same way they treat brokers providing real estate services via bricks-and-mortar businesses. Those other provisions of the settlement agreement include prohibiting NAR from adopting any rule or enforcing any practice that

- Unreasonably disadvantages or discriminates against a broker's use of a VOW
- Impedes referral of customers whose identities are obtained from a VOW by a broker who uses a VOW to other persons
- Imposes unreasonable fees or costs upon any broker who operates a VOW

The agreement requires NAR to

- Adopt the Modified VOW Policy and not change it without DOJ consent
- Deny insurance coverage to any REALTOR® association or association-owned MLS that refuses to act consistently with the Modified VOW Policy
- Report compliance with the Modified VOW Policy to DOJ on a quarterly basis

Apart from these requirements of the settlement agreement, it's clear that discrimination by an MLS among participants based on a participant's business model risks serious challenge under the antitrust laws. The expiration of the 2008 settlement agreement will have no impact in the extent to which MLSs make their services available to their participants. They will continue to do so uniformly, irrespective of the manner in which participants provide brokerage services to consumers.

The Participation Rule set forth in the 2008 settlement agreement permits MLSs to limit access to only those brokers engaged in real estate brokerage; that is, those actively endeavoring to list real property or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS.

Another important aspect of the 2008 settlement agreement was DOJ's acknowledgement that the purpose of an MLS is to facilitate brokerage services, and it was therefore lawful and appropriate for an MLS to limit participation in the MLS to those actually engaged in brokerage activity. Mere possession of a broker's license was no longer sufficient to qualify for MLS participation. Rather, MLSs may require that participants actively endeavor to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents. This added requirement essentially disqualifies any company or individual from joining the MLS if such person has no intention of cooperating with and compensating real estate brokers for their role in listing and selling real property.

The 2008 settlement agreement states that it is permissible for NAR to adopt the Participation Rule attached to the agreement. Such rule is not required and, therefore, amending it without DOJ approval would be permissible provided that the amendment does not violate any other provision of the 2008 settlement agreement.

NAR has no plans to alter the Modified VOW Policy when the 2008 settlement agreement expires on November 18, 2018.

Since we do not know how many VOWs are in operation today, we cannot know how many brokers are affected by the Modified VOW Policy. Therefore, there has been no real discussion that we are aware of about making any changes to the Modified VOW Policy when the settlement agreement expires. If NAR determines that some modifications to that policy are helpful and lawful, we may consider implementing them but would do so very judiciously and with careful consideration to avoid any potentially anticompetitive implications of such proposed changes.

Katie Johnson is the General Counsel and Senior Vice President of Member Experience for the National Association of REALTORS®.

Future of VOW Policy After DOJ-NAR Agreement Expiration

NAR continues to keep VOW policy in place as outlined in the original agreement, steering clear of any potentially anticompetitive implications.

November 27, 2018

Competition in Real Estate

REALTORS® provide a vibrant, healthy, and vigorously competitive real estate market with more information today than has ever been available.